Supreme Court, U.S.
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No. 06-999

In the Supreme Court of the United States

CELESTINE FAULKS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the procedural requirements of *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), and *Blakely* v. *Washington*, 542 U.S. 296 (2004), precluded the district court from finding, by a preponderance of the evidence, that petitioner had violated a condition of supervised release, and then requiring her to serve a term of imprisonment upon revocation of her supervised release.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is not published in the Federal Reporter but is available at 195 Fed. Appx. 196.

JURISDICTION

The judgment of the court of appeals was entered on September 19, 2006. On December 12, 2006, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including January 17, 2007, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Virginia, petitioner was convicted of conspiracy to defraud a financial institution, in violation of 18 U.S.C. 371, and bank fraud, in-

violation of 18 U.S.C. 1344. C.A. App. 4-5, 12. She was sentenced to 30 months of imprisonment, to be followed by five years of supervised release. *Id.* at 13-14. After her release from prison, petitioner violated the terms of her supervised release. Pet. App. 2a. The district court revoked petitioner's supervised release and ordered her to serve an additional 36 months of imprisonment. *Ibid.* The court of appeals affirmed. *Id.* at 1a-4a.

1. In 1996, petitioner recruited individuals to open accounts at federally insured credit unions. Petitioner deposited worthless checks drawn on closed accounts or accounts with insufficient funds into those credit union accounts. Then, at petitioner's direction, the credit union account holders made cash withdrawals or obtained cashier's checks and gave the money to petitioner. Presentence Investigation Report ¶¶ 4-10 (PSR).

In 1998, petitioner was convicted of conspiracy to defraud a financial institution, in violation of 18 U.S.C. 371, and bank fraud, in violation of 18 U.S.C. 1344. C.A. App. 12. The PSR determined that petitioner's total offense level was 17, her criminal history category was I, and the resulting Sentencing Guidelines range was 24 to 30 months of imprisonment. PSR ¶¶ 66-68. The district court sentenced petitioner to 30 months of imprisonment. C.A. App. 13, 18. The court explained that it was sentencing petitioner "at the high end of the guideline range because she did not accept any responsibility for her crimes, the crimes were committed over a significant period of time, and [petitioner] had recruited others to participate in the bank fraud scheme." *Id.* at 18.[1]

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[1] In an interview with the probation officer, petitioner claimed that a neighbor who resembled her had committed the crimes, that photographs introduced at trial were actually pictures of the neighbor, and that petitioner's fingerprints were found on one of the checks used in

2. In July 2000, petitioner was released from prison and began to serve her term of supervised release. C.A. App. 19-20. On May 16, 2005, the United States Probation Office filed a petition to revoke petitioner's supervised release. *Id.* at 19-22. The petition alleged that petitioner had violated a condition of that release requiring her not to "commit another federal, state, or local crime." *Id.* at 14; see *id.* at 19-22. The petition explained that petitioner had been charged in Virginia state court with forgery, obtaining money under false pretenses, and uttering forged checks. See *id.* at 21-22.[2]

On November 9, 2005, the district court held a hearing to determine whether to revoke petitioner's supervised release. At the hearing, petitioner's counsel noted that petitioner had been indicted on state charges arising from "the same factual circumstances" that had prompted the revocation petition. C.A. App. 31. Counsel asked the district court to "defer[] [the supervised release revocation proceedings] pending the outcome[]" of the state criminal case. *Id.* at 35. Counsel expressed concern that, in order for petitioner to defend herself against the alleged supervised release violations, she "would have to waive her privilege against self-incrimination [and] expose herself to cross-examination under oath," and her testimony could then be used against her in the state court proceedings. *Id.* at 31-32. The district court refused to postpone the revocation hearing. The court explained that the state criminal prosecution and

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the commission of the offenses because the neighbor had given petitioner the check. PSR ¶ 16.

[2] The Probation Office subsequently submitted an addendum to the petition which noted that petitioner had been indicted by a state grand jury on the forgery and uttering charges. C.A. App. 23-24; see *id.* at 34-35.

the federal supervised release revocation proceedings were "separate matters" and that the preponderance-of-the-evidence standard, not the beyond-a-reasonable-doubt standard applicable in criminal trials, applied in revocation proceedings. *Id.* at 33-34; see *id.* at 176-177 (observing that "these proceedings are not controlling [in the state case] and cannot be used as any evidence of guilt on any criminal proceedings").

After hearing testimony from several witnesses, C.A. App. 36-120, the court found that the preponderance of the evidence established that petitioner had obtained an ATM card and PIN number from a woman named Violet Blow, had deposited two checks drawn on a closed bank account into Blow's account at Wachovia Bank, and had directed Blow to withdraw the funds the following morning, while petitioner waited outside the bank. *Id.* at 180-187. Petitioner, testifying on her own behalf, denied any involvement in the scheme. *Id.* at 149-150. She contended that another woman, Leslie Williams, had committed the offenses. *Id.* at 173-175, 178. Petitioner testified that bank surveillance photographs of the person who deposited the second check resembled Williams. *Id.* at 151-153.[3] Petitioner further claimed that the government's witnesses were "all Leslie Williams' friends." *Id.* at 157.[4]

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[3] Several of petitioner's relatives and friends also testified that the bank photos did not appear to be petitioner. C.A. App. 122-123, 133-134, 139, 141, 145, 148.

[4] Petitioner also testified that her wallet had been stolen and that another person told her that Williams had the wallet. C.A. App. 153-154. Petitioner acknowledged, however, that there was no suggestion that her identification was used in any of the bank transactions. *Id.* at 160-161.

The district court found that petitioner was not a "believable witness." C.A. App. 180. After "dealing with [petitioner] for years," the court was "one hundred percent sure" and "would find * * * beyond a reasonable doubt" that petitioner was the person pictured in the bank surveillance photos. *Id.* at 184-185. The court concluded that petitioner had committed the supervised release violations, revoked petitioner's supervised release, and ordered her to serve an additional 36 months of imprisonment. *Id.* at 185-187, 193; see *id.* at 201-203 (Order).

At a hearing on petitioner's motion for reconsideration of the revocation order, Leslie Williams testified that she had not deposited checks into or withdrawn funds from Violet Blow's bank account. C.A. App. 220-221. In denying petitioner's reconsideration motion, the district court found that Williams "does not have the same physical characteristics as [petitioner] or the individual in the surveillance photographs." *Id.* at 232-233 & n.1. In particular, the court noted, petitioner is "older (by about twenty years), is much thinner, and has a lighter complexion" than Williams. *Id.* at 232 n.1.

3. On appeal, petitioner's counsel filed a brief pursuant to *Anders* v. *California*, 386 U.S. 738 (1967), in which he argued that the imposition of an additional term of imprisonment following the revocation of petitioner's supervised release was unconstitutional under *Blakely* v. *Washington*, 542 U.S. 296 (2004), and *United States* v. *Booker*, 543 U.S. 220 (2005). Pet. App. 2a; see Pet. C.A. Br. 7-13. Petitioner filed a pro se supplemental brief in which she challenged the sufficiency of the evidence supporting the district court's revocation ruling. Pet. App. 2a.

The court of appeals affirmed the district court's judgment in an unpublished, per curiam opinion. Pet. App. 1a-4a. The court rejected the argument that the supervised release revocation and additional sentence were unconstitutional under *Blakely* and *Booker*. *Id.* at 2a. The court observed that this Court's opinion in *Booker* had included the supervised release statute, 18 U.S.C. 3583, in a listing of provisions of the Sentencing Reform Act of 1984, 18 U.S.C. 3551 *et seq.*, that remained valid after the Court's decision. Pet. App. 2a (citing *Booker*, 543 U.S. at 258). The court of appeals also rejected petitioner's challenge to the sufficiency of the evidence to support the revocation decision. *Id.* at 3a. Noting that the government had presented the testimony of several witnesses "who explained the fraudulent scheme masterminded by [petitioner] and her role therein," the court concluded that the district court was "well within bounds" in rejecting as "incredible" petitioner's claim that Williams had perpetrated the fraud. *Ibid.*

ARGUMENT

Petitioner contends (Pet. 7-29) that the district court's conduct of supervised release revocation proceedings leading to the revocation of supervised release and the imposition of a sentence of imprisonment was contrary to *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), and *Blakely* v. *Washington*, 542 U.S. 296 (2004). Those cases require that "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." *United States* v. *Booker*, 543 U.S.

220, 244 (2005). Petitioner claims that the finding that she violated her supervised release subjected her to criminal punishment not authorized by the jury verdict on her underlying offenses, and the supervised-release violation was not charged by indictment or proved to a jury beyond a reasonable doubt. The court of appeals correctly rejected that claim, and it does not warrant this Court's review.

1. At petitioner's initial sentencing for her conspiracy and bank fraud convictions, the district court had authority to "include as a part of the sentence" a term of supervised release. 18 U.S.C. 3583(a). During a supervised release term, the defendant is required to comply with court-imposed conditions. 18 U.S.C. 3583(d). If the district court "finds by a preponderance of the evidence that the defendant violated a condition of supervised release," the court is authorized to "revoke [the] term of supervised release, and require the defendant to serve in prison all or part of the term of supervised release authorized by statute for the offense that resulted in such term of supervised release," up to specified limits based on the seriousness of the underlying offense. 18 U.S.C. 3583(e)(3).

Those provisions of Section 3583 were in effect when petitioner committed her offenses of conviction in 1996. Therefore, the statutory maximum sentence that petitioner could have received for those offenses included a 30-year term of imprisonment on the bank fraud count, see 18 U.S.C. 1344, a five-year term of imprisonment on the conspiracy count, see 18 U.S.C. 371, a five-year term of supervised release, see 18 U.S.C. 3583(b)(1), and an additional three-year term of imprisonment if she violated any condition of her supervised release, see 18 U.S.C. 3583(e)(3). Petitioner was sentenced within that

statutory maximum to an initial 30-month term of imprisonment and a five-year term of supervised release, followed by an additional three-year term of imprisonment, when it was established that she had committed violations of her supervised release conditions. There was no *Apprendi* error.

Petitioner's contention (Pet. 22-29) that imposition of the additional three-year term of imprisonment was unconstitutional under *Apprendi* lacks merit. A proceeding to revoke a defendant's term of supervised release is fundamentally different from an initial sentencing proceeding. Unlike initial sentencing, the revocation of supervised release does not impose punishment for a new offense. Instead, the revocation of supervised release modifies the already-authorized punishment for an earlier offense—the offense of conviction. Because the revocation of supervised release does not impose any punishment that is not already authorized by the jury verdict on the underlying offense, it does not implicate *Apprendi*.

Although this Court has applied the *Apprendi* rule to a variety of sentencing regimes, the Court has never extended the rule beyond initial sentencing proceedings. See *Apprendi*, 530 U.S. at 468-469 (statutory enhancement to sentence); *Ring* v. *Arizona*, 536 U.S. 584, 592-595 (2002) (capital sentencing); *Blakely*, 542 U.S. at 299-300 (determinate sentencing guidelines); *Booker*, 543 U.S. at 227-229 (same). Moreover, the Court made clear in *Booker* that there is no constitutional defect in the statutory provisions permitting violations of supervised release to be found by the district court by a preponderance of the evidence. The Court noted that many provisions of the Sentencing Reform Act of 1984, 18 U.S.C. 3551 *et seq.*, are "perfectly valid" notwithstand-

ing the *Booker* decision, and it specifically listed the supervised release statute, 18 U.S.C. 3583, as an example of a valid provision. See *Booker*, 543 U.S. at 258.

Petitioner's contrary view depends on the premise that a district court, when revoking supervised release and reimprisoning a defendant, imposes punishment for the violation of supervised release. That premise is incorrect. In *Johnson* v. *United States*, 529 U.S. 694 (2000), decided just one month before *Apprendi*, this Court noted the "serious constitutional questions that would be raised by construing revocation and reimprisonment as punishment for the violation of the conditions of supervised release." *Id.* at 700. One of several constitutional problems that would be raised by that approach, the Court explained, is the fact that "the violative conduct * * * need only be found by a judge under a preponderance of the evidence standard, not by a jury beyond a reasonable doubt." *Ibid.* The Court concluded that "[t]reating postrevocation sanctions as part of the penalty for the initial offense * * * avoids these difficulties. * * * We therefore attribute postrevocation penalties to the original conviction." *Id.* at 700-701. Thus, rather than punishing a defendant for violating a condition of supervised release, revocation of supervised release is part of the authorized punishment imposed for the underlying offense. See, *e.g.*, *United States* v. *Fareed*, 296 F.3d 243, 247 (4th Cir.) (noting that this Court "held in *Johnson* that post-revocation prison sentences are sentences for the original federal crime, not punishment for the violation of the terms of supervised release"), cert. denied, 537 U.S. 1037 (2002).[5]

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[5] For that reason, the revocation of supervised release is quite different from the criminal contempt fines at issue in *International*

Consequently, when a defendant is convicted of an offense and receives a term of supervised release, the maximum term of imprisonment to which he is exposed is already established, based on his admissions or a jury verdict, to include time in prison if supervised release is revoked. The revocation of supervised release does not enlarge the defendant's maximum potential prison term. Instead, it represents the withdrawal of the right to continue on a release status that was conditional at the outset. See *United States* v. *Huerta-Pimental*, 445 F.3d 1220, 1225 (9th Cir.) ("[I]mposition of imprisonment following the revocation of supervised release is part of the original sentence authorized by the fact of conviction and does not constitute additional punishment beyond the statutory maximum."), cert. denied, 127 S. Ct. 545 (2006).[6]

Union, United Mine Workers v. *Bagwell*, 512 U.S. 821 (1994), on which petitioner relies (Pet. 9-10, 28). In that case, the Court concluded that fines of $52 million were "criminal," and triggered the right to trial by jury, in part because they punished the union for violating an injunction entered by the district court. *Bagwell*, 512 U.S. at 826-830, 837-838. The imprisonment imposed upon revocation of supervised release, in contrast, does not punish the defendant for violating the terms of supervised release. Instead, it is part of the punishment authorized for the underlying offense, and a defendant enjoys the right to a jury trial before that punishment may be imposed.

[6] Petitioner asserts that her "1998 conviction authorized a maximum sentence under the then-mandatory Guidelines of 30 months' imprisonment." Pet. 23. By modifying the Sentencing Reform Act to make the Guidelines advisory, however, *Booker* remedied the constitutional problem presented by the mandatory Guidelines. See *Booker*, 543 U.S. at 258-260. Thus, the maximum sentence authorized by the jury verdict in a federal criminal case is now the statutory maximum for the offense under the United States Code. To the extent that petitioner's argument is based on the fact that she was convicted and sentenced before the decision in *Booker*, when the effective maximum was lower than the

In that respect, the revocation of supervised release is comparable to the revocation of parole or probation rather than initial criminal sentencing. See *Johnson*, 529 U.S. at 710-711 (noting the "similarity" between supervised release and parole); see also, *e.g.*, *United States* v. *Hall*, 419 F.3d 980, 985 n.4 (9th Cir.) ("Parole, probation, and supervised release revocation hearings are constitutionally indistinguishable and are analyzed in the same manner."), cert. denied, 126 S. Ct. 838 (2005); *United States* v. *Jones*, 299 F.3d 103, 109 (2d Cir. 2002) ("[T]he constitutional guarantees governing revocation of supervised release are identical to those applicable to revocation of parole or probation."). In parole or probation revocation proceedings, the full sweep of rights associated with a criminal trial does not apply. See, *e.g.*, *Morrissey* v. *Brewer*, 408 U.S. 471, 480 (1972) ("[R]evocation of parole is not part of a criminal prosecution and thus the full panoply of rights due a defendant in such a proceeding does not apply to parole revocations."); *Gagnon* v. *Scarpelli*, 411 U.S. 778, 782 (1973) ("Probation revocation, like parole revocation, is not a stage of a criminal prosecution."). Likewise, the Sixth Amendment rights accorded in a criminal prosecution do not apply to supervised release revocation. See *United States* v. *Carlton*, 442 F.3d 802, 809 (2d Cir. 2006) ("[I]t is evident that the constitutional rights afforded a defendant subject to revocation of supervised release for violation of its conditions are not co-extensive with those enjoyed by a suspect to whom the presumption of innocence attaches."); *United States* v. *Work*, 409 F.3d 484, 491 (1st Cir. 2005) ("The law is clear that once the origi-

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maximum specified by statute, petitioner presents a transitional issue that is of diminishing importance and does not warrant this Court's review.

nal sentence has been imposed in a criminal case, further proceedings with respect to that sentence are not subject to Sixth Amendment protections.").

That conclusion is consistent with the established understanding that parole, probation, or "a sentence of supervised release by its terms involves a surrender of certain constitutional rights." *Carlton*, 442 F.3d at 809. See, *e.g.*, *United States* v. *Knights*, 534 U.S. 112, 119 (2001) ("Inherent in the very nature of probation is that probationers do not enjoy the absolute liberty to which every citizen is entitled.") (internal quotation marks and citation omitted). Part of the punishment entailed by parole, probation, or supervised release is the imposition of "reasonable conditions that deprive the offender of some freedoms enjoyed by law-abiding citizens." *Ibid.* And "it has long been understood that a fundamental and unchallenged condition of probation is that the probationer surrender his right to trial by jury should the government seek revocation, and thus imprisonment." *United States* v. *Cranley*, 350 F.3d 617, 621 (7th Cir. 2003). Likewise, one of the conditions placed on a defendant's liberty in supervised release is that the supervised release may be revoked and imprisonment reimposed based on a judicial finding by a preponderance of the evidence of a violation of the terms of that release. See 18 U.S.C. 3583(e)(3).

Petitioner's proposed extension of *Apprendi* to supervised release revocation proceedings would seriously undermine the government's interest in effectively supervising prisoners following their release from imprisonment. See, *e.g.*, *Samson* v. *California*, 126 S. Ct. 2193, 2200 (2006) (emphasizing importance of State's "interests in reducing recidivism and thereby promoting reintegration and positive citizenship among probationers

and parolees"); *United States* v. *Johnson*, 529 U.S. 53, 59 (2000) ("Congress intended supervised release to assist individuals in their transition to community life."). The difficulties that petitioner's approach would create are well illustrated by her contention (Pet. 26-27) that her supervised release violations should have been charged by indictment. That would indeed be a necessary consequence of a holding that *Apprendi* applies. See *United States* v. *Cotton*, 535 U.S. 625, 627 (2002). But indicting a defendant for a supervised release violation would conflict with the settled understanding that such revocation does not punish the defendant for a new offense. See *Johnson*, 529 U.S. at 700. It would also produce the anomaly that, if the supervised release violation truly increased the punishment for the underlying offense, as petitioner's *Apprendi* argument implies, the indictment for the original offense would have to include that fact. But that would not be possible, because the supervised release violation does not occur until after conviction.

The implications of petitioner's theory could extend far beyond proceedings governing the revocation of supervised release. The factual determinations supporting revocation of probation and parole would likely become subject to *Apprendi* as well.[7] Indeed, the institution of parole itself could be swept into the Sixth Amendment.

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[7] Although petitioner asserts that "supervised release is fundamentally distinguishable from parole" (Pet. 17), the formal declaration by a State to a parolee that the individual remains in "legal custody" (Pet. 12 n.12) (quoting S. Rep. No. 225, 98th Cong., 1st Sess. 122 (1983)) does not seem a particularly significant factor under a doctrine whose "relevant inquiry is not one of form, but of effect." Pet. 25 (quoting *Apprendi*, 530 U.S. at 494). And petitioner makes no effort to distinguish revocation of probation from revocation of supervised release.

Although the decision to release a prisoner on parole is generally discretionary, there may be factual findings that must accompany any decision to grant or withhold parole. Petitioner's proposed theory might well apply to such findings. Similarly, the facts supporting prison disciplinary proceedings that result in the withdrawal of good-time credits might also fall within *Apprendi*'s domain if petitioner's theory were accepted. Those potential outcomes counsel against extending *Apprendi* to post-sentencing determinations that have an effect on the amount of prison time served.

2. a. Every court of appeals that has addressed the issue has held that *Apprendi* does not apply to revocation of a defendant's supervised release followed by imposition of an additional term of imprisonment. See *United States* v. *Dees*, 467 F.3d 847, 854-855 (3d Cir. 2006), petition for cert. pending, No. 06-10826 (filed Apr. 18, 2007); *United States* v. *Cordova*, 461 F.3d 1184, 1186-1188 (10th Cir. 2006); *Huerta-Pimental*, 445 F.3d at 1223-1225; *Carlton*, 442 F.3d at 807-810; *United States* v. *Hinson*, 429 F.3d 114, 116-119 (5th Cir. 2005), cert. denied, 126 S. Ct. 1804 (2006); *Work*, 409 F.3d at 489-492; *United States* v. *Coleman*, 404 F.3d 1103, 1104-1105 (8th Cir. 2005) (per curiam); Pet. App. 2a.

Petitioner attempts to undermine that uniform conclusion by arguing (Pet. 7, 14-19) that the courts of appeals have taken "conflicting approaches" in reaching the same result. That is incorrect. Although the courts of appeals have sometimes advanced different reasons for their common conclusion, there is no inconsistency in the reasons on which the courts have relied. In any event, any divergence in reasoning does not change the essential fact that the holdings of all the courts of appeals are identical: *Apprendi* does not constrain the

revocation of supervised release, and Section 3583(e)(3) is constitutional. This Court "reviews judgments, not statements in opinions." *California* v. *Rooney*, 483 U.S. 307, 311 (1987) (per curiam) (quoting *Black* v. *Cutter Labs.*, 351 U.S. 292, 297 (1956)). Absent disagreement among the circuits about the constitutionality of Section 3583(e)(3), this Court's review is not warranted.

b. Petitioner also contends (Pet. 19-22) that the court of appeals' decision conflicts with several state-court decisions. None of the cases on which petitioner relies is a decision of a state court of last resort, however, and thus any conflict between one of those decisions and the decision below would not warrant the exercise of this Court's certiorari jurisdiction. See Sup. Ct. R. 10(a). In any event, there is no conflict. None of the state-court decisions addresses the constitutionality of the federal supervised release statute or any analogous question.

State v. *Buehler*, 136 P.3d 64 (Or. Ct. App. 2006), on which petitioner principally relies, did not involve a challenge to a sentence imposed after revocation of a term of probation or supervised release. Instead, the court held that the defendant's *original* sentence violated *Blakely* and *Apprendi* because the trial court departed upward from a presumptive sentence of probation to a sentence of imprisonment based on facts that were not admitted by the defendant or found by a jury. *Id.* at 65-66. Similarly, both *State* v. *Gibson*, No. 05 COA 032, 2006 WL 2256994 (Ohio Ct. App. Aug. 8, 2006) (unpublished), and *State* v. *McMahan*, 621 S.E.2d 319 (N.C. Ct. App. 2005), review allowed, 640 S.E.2d 390 (N.C. 2006), involved challenges to the sentences imposed at the defendants' *original* sentencing proceedings. Neither case involved a claim that *Apprendi* requires the finding that the de-

fendant violated the conditions of probation to be made by a jury beyond a reasonable doubt.

Likewise, in *State* v. *Beaty*, 696 N.W.2d 406 (Minn. Ct. App. 2005), the defendant did not contend that *Apprendi* applied to the trial court's finding that he violated the conditions of his probation. On the contrary, the defendant "admitted the violations," *id.* at 408, and instead raised a standard *Blakely* challenge to the sentence imposed. He argued that the sentence "was an upward durational departure from the presumptive guidelines sentence," and the facts supporting the departure therefore should have been found by the jury. *Id.* at 408, 412. Unlike the defendant in *Beaty*, petitioner does not claim that the district court erred in sentencing her above the advisory Sentencing Guidelines range.[8]

Nor does *State* v. *France*, No. E2003-01293-CCA-R3CD, 2004 WL 1606987 (Tenn. Crim. App. July 19, 2004) (unpublished decision), conflict with the decision in this case. In *France*, the court merely noted that *Blakely* "call[ed] into question" the validity of the State's overall sentencing scheme. *Id.* at *2 n.1. The court's actual holding was based entirely on unrelated state-law grounds. *Id.* at *4-*5.

3. Even if the *Apprendi* question that petitioner raises otherwise warranted this Court's review, this case would be an inappropriate vehicle for resolving it. Petitioner forfeited the claim that the revocation of her su-

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[8] Chapter 7 of the Sentencing Guidelines, which applies to violations of probation or supervised release, was understood as advisory even before *Booker*. See, *e.g.*, *Huerta-Pimental*, 445 F.3d at 1224 ("Because the revocation of supervised release and the subsequent imposition of additional imprisonment is, and always has been, fully discretionary, it is constitutional under *Booker*.").

pervised release and the imposition of an additional term of imprisonment violated *Apprendi* because she did not raise that claim in the district court. Petitioner did not cite *Apprendi*, *Blakely*, or *Booker* during the supervised release proceedings, and did not contend that the proceedings violated her Fifth Amendment right to a grand jury indictment or her Sixth Amendment right to a jury finding of guilt beyond a reasonable doubt. See C.A. App. 31-35. Instead, petitioner requested that the court "defer[]" the revocation hearing pending resolution of the state charges against her, on the ground that her testimony at the revocation hearing might be viewed as a waiver of her Fifth Amendment privilege against self-incrimination, permitting that testimony to be used against her in the state prosecution. *Id.* at 31-32, 35.

Because petitioner did not preserve her *Apprendi* claim in the district court, that claim may be reviewed only for plain error. Fed. R. Crim. P. 52(b). Under the plain error standard, an error does not warrant reversal on appeal unless a defendant can show that it was "clear" or "obvious" and affected his substantial rights. *United States* v. *Olano*, 507 U.S. 725, 732-734 (1993). Even then, reversal is not warranted unless the defendant can show that the error seriously affected the fairness, integrity, or public reputation of the proceedings. *Id.* at 736.

Petitioner cannot satisfy that standard. Even assuming *arguendo* that the district court's imposition of an additional term of imprisonment based on its finding of a supervised release violation was error, the error was not plain. This Court has never extended *Apprendi* beyond initial sentencing proceedings, and the Court in *Booker* deemed the supervised release provisions "perfectly valid." *Booker*, 543 U.S. at 258. In light of the

uniform authority in the courts of appeals holding that the revocation of supervised release does not implicate *Apprendi*, any error cannot have been "clear" or "obvious." *Olano*, 507 U.S. at 734.

Moreover, petitioner could not establish that any error affected her substantial rights or seriously affected the fairness, integrity, or public reputation of judicial proceedings. Petitioner did not contest the government's evidence showing that worthless checks were deposited into an account at Wachovia Bank or that funds were withdrawn from the account illegally. The only fact in dispute at the supervised release revocation hearing was whether the person pictured in bank surveillance photos depositing one of the checks was petitioner or was instead Leslie Williams, as petitioner claimed. In light of the district court's findings on the differences in age and appearance between petitioner and Williams, and the court's conclusion "beyond a reasonable doubt" that petitioner was the person depicted in the bank photos, C.A. App. 184-185, 232-233 & n.1, petitioner's claim of mistaken identity was insufficient to raise a serious dispute about her involvement in the illegal bank transactions. Cf. *Cotton*, 535 U.S. at 633 (fourth component of plain-error test not satisfied when relevant fact is "essentially uncontroverted") (quoting *Johnson* v. *United States*, 520 U.S. 461, 470 (1997)).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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